ELECTION: DIRECT PRIMARY LAW: INELIGIBILITY OF CANDIDATE RECEIVING HIGHEST VOTE.—In the August State primary election, Wm. D. Stephens, present incumbent, received the highest number of votes for Governor on the Republican ticket. James Rolph, present Mayor of San Francisco, was another candidate on the Republican ticket. On the Democratic ticket Rolph was likewise a candidate and received the highest number of votes. Francis J. Heney and Thomas L. Woolwine were other Democratic candidates. The two latter were legally affiliated with the Democratic party, whereas Rolph was legally affiliated with the Republican party. The Direct Primary Law of 1913,[1] declares that, except as to judicial, school, county, township, or municipal officers, the person receiving the highest number of votes at a primary election as a candidate for an office of a particular party shall be the candidate of that party for such office; but the law was amended in 1917,[2] by adding the proviso that no candidate failing to receive the highest number of votes for the nomination of the political party with which he was "affiliated thirty-five days before the date of the primary election", should be entitled to be the candidate of any other political party. If Rolph had won the nomination of the Republican party, with which he was legally affiliated, he would have been also the candidate of the Democratic party, but having failed to become the nominee of the Republican party, he was, by the words of the above statute, disqualified from being the candidate of the Democratic party.

Under the above facts arises the case of *Francis J. Heney v. Jordan, Secretary of State.*[3] The state constitution authorizes direct primary laws in the following words: "the legislature shall enact laws providing for the direct nomination of candidates for public office, by electors, political parties, or organizations of electors without conventions, at elections to be known and designated as primary elections; also to determine the tests and conditions upon which electors, political parties, or organizations of electors may participate in any such primary election."[4] The Supreme Court has held that, under this provision, the legislature may prescribe any test for candidates for party nomination, which has a reasonable relation to the maintenance of the integrity of political parties, an obvious and authorized purpose of the primary law.[5] On the authority of this case and of a later case,[6] the constitutionality of the amendment of 1917 is sustained as a reasonable means of maintaining the integrity of political parties.

Rolph having thus been declared ineligible for nomination as

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[1] Cal. Stats. 1913, p. 1379.
[2] Cal. Stats. 1917, p. 1341.
[3] (Sept. 24, 1918), 56 Cal. Dec. 295.
[4] Cal. Const., Art. II, § 2½.
[5] Socialist Party v. Uhl (1909), 155 Cal. 776, 103 Pac. 181.
[6] Hart v. Jordan (1914), 168 Cal. 321, 143 Pac. 537.

Democratic candidate for Governor, the question arises whether Heney, second in the poll, may be considered to be the Democratic nominee. In spite of almost uniform practice in American courts to the contrary, an opinion is prevalent that when the highest candidate is ineligible the next highest is to be regarded as elected or nominated. Perhaps the only case holding to this effect is an early Indiana decision.[7] This decision may have been partly based on a general doctrine that votes cast for an ineligible candidate are to be wholly disregarded, and partly on the special doctrine of the English courts that when the fact is notorious and directly brought to the attention of the voters that a candidate is ineligible or dead, votes for him are to be considered as thrown away, and so not to be taken into account in the final canvass.[8] But the rule of the American courts is thoroughly well established that when the candidate receiving the majority or plurality of votes is ineligible, no one has been elected.[9] The rule and its reason are well stated in the leading California case as follows:

"An election is the deliberate choice of a majority or plurality of the electoral body. This is evidenced by the votes of the electors. But if a majority of those voting, by mistake of law or fact, happen to cast their votes upon an ineligible candidate, it by no means follows that the next to him on the poll should receive the office. If this be so, a candidate might be elected who received only a small portion of the votes and who never could have been elected at all but for this mistake. The votes are not less legal votes because given to a person in whose behalf they cannot be counted; and the person who is the next to him on the list of candidates does not receive a plurality of votes because his competitor was ineligible. The votes cast for the latter, it is true, cannot be counted for him; but that is no reason why they should, in effect, be counted for the former, who, possibly could never have received them. It is fairer, more just, and more consistent with the theory of our institutions, to hold the votes so cast as merely ineffectual for the purpose of an election, than to give them the effect of disappointing the popular will, and electing to office a man whose pretensions the people had designed to reject."[10]

W. C. J.

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[7] Gulick v. New (1860), 14 Ind. 93, 77 Am. Dec. 49.

[8] King v. Hawkins (1808), 10 East 211, 103 Eng. Rep. R. 755; Regina v. Mayor of Tewkesbury (1868), L. R. 3 Q. B. 629.

[9] Saunders v. Haynes (1859), 13 Cal. 145; Campbell v. Free (1907), 7 Cal. App. 151, 93 Pac. 1060; State v. Bell (1907), 169 Ind. 61, 82 N. E. 69, 124 Am. St. Rep. 203, 13 L. R. A. (N. S.) 1013; Hanson v. Grattan (1911), 84 Kan. 843, 115 Pac. 646, 34 L. R. A. (N. S.) 240; Saunders v. Rice (1918), R. I., 102 Atl. 914, L. R. A. 1918C, 1153.

[10] Supra, n. 9.